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### A Liberal Route from Homogeneity?

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## **A liberal route from homogeneity? US policymakers and the liberalization of ethnic nationalists in Bosnia's Dayton Accords**

This paper explores how key US policymakers' understandings of nationalism contributed to core tensions in Bosnia's Dayton Peace Accords. Drawing on in-depth interviews with some of Dayton's key architects, our findings suggest that US elites drew on a cluster of entwined social knowledge claims about (ethnic) nationalism and the possibility of its liberal accommodation. US policymakers' social knowledge was anchored around two key liberal beliefs: a Millian acknowledgement that territorial homogeneity would facilitate political stability and liberal governability, and a countervailing normative desire to liberalize ethnic nationalisms through the imposition of liberal-legalist frameworks.

After several failed attempts by the US, the EU and the UN to end three years of vicious ethnic cleansing in the former Yugoslavia, in November 1995 the Clinton Administration led the Dayton Accords, a political process that ended the Bosnian war and designed a renewed multiethnic Bosnian state. This paper explores the central tension that defined these US-brokered Accords: on the one hand, to achieve liberal stability Dayton constituted a pragmatic, *realpolitik* sanctioning of the ethnically majoritized or homogenized regions that ethnic cleansing had created; on the other hand, to liberalize the new state it also contained more innovative, progressive and far-reaching human rights and refugee protections than had any previous peace agreement, indeed it set the benchmark for future agreements. This core tension, evident both throughout the negotiations and in Dayton's General Framework Agreement (GFA) itself, was partly due to the overriding geopolitical imperative of ending the war (albeit after substantial hesitation), and the inevitable territorial compromises and constitutional concessions that this entailed.<sup>1</sup> It also partly reflected the peace treaty "liberal legalism" that defined the 1990s' decade of global constitutionalism, and the numerous post-conflict constitutions drafted with the help of US international and human rights lawyers.<sup>2</sup> And, as one such lawyer put it: "the problem with all these postwar interventions [was] that the people who negotiated the peace were not the people who implemented them".<sup>3</sup>

And yet, importantly, interviews with key architects of the Dayton process and Accords suggest a very distinctive set of assumptions, or social knowledge of nationalism and of the possibility of its liberal accommodation also crucially underpinned US policymaker's efforts. Put differently, how key US policymakers themselves theorized and understood ethnic nationalism and its claims was also

crucial to Dayton's defining central tension. Indeed, we suggest that much of Dayton's process and outcome was driven by a particular cluster of assumptions—that is, US elite knowledge of nationalism—anchored around two key countervailing liberal beliefs or imperatives: a Millian acknowledgement that rule by co-ethnics (or territorial homogeneity) would facilitate political stability and liberal governability, and a countervailing liberal normative desire to liberalize ethnic nationalisms through the imposition of liberal-legalist frameworks.

More specifically, our interview data suggests that US elites drew on the following cluster of entwined—if sometimes conflicting—knowledge claims throughout the Dayton process: a Millian notion that homogeneity (or majoritized regions) might make liberal arrangements work better; a strong belief that partitions (in practice) and collectivism (in principle) were unacceptable; an instrumentalized understanding of ethnicity; a belief that nationalism was a political claim more than a constitutive expression of identity; and a domestically-informed view that 'liberal legalist' frameworks would not only make multiethnicity possible, but that the creation of multiethnicity itself was a valuable aspiration.

We present the findings in two steps. First, we find that US elites sought to create or *affirm homogeneity*—though brutally achieved—but that they did so in significant measure based on liberal, Millian assumptions. Specifically, we empirically examine their thinking in the creation of Dayton's IEBL (Inter-Entity Boundary Line), or the internal border between the Bosniak-Croat Federation and the Republika Srpska (RS). Second, we find that, once affirmed, Dayton's architects then sought to *temper or mitigate homogeneity* by designing the possibility of using legal, constitutional escapes from this created or sanctioned homogeneity. We explore their understandings of these efforts at mitigation, and indeed at re-pluralizing Bosnia, in the context of the GFA's electoral, constitutional, judicial, and human rights and refugee provisions.

### **Liberalizing ethnic nationalists?**

As noted, the cluster of assumptions or knowledge claims that underpinned much US elite thinking throughout the Dayton process fundamentally revolved around a key descriptive-normative tension within liberal understandings of nationalism and its accommodation. This analytical tension is usefully captured in both John Stuart Mill's

and Ernest Gellner's work. As we show below, US elites operated—sometimes explicitly, sometimes implicitly—on a Millian recognition that greater homogeneity would enable the effective functioning of liberal democracy. In considering the relationship between nationality and liberalism, Mill famously thought that while the “sentiment of nationality” must not outweigh the “love of liberty”, “it is in general a necessary condition of free institutions, that the boundaries of governments should coincide in the main with those of nationalities”; because where this is not the case, “free institutions are next to impossible in a country made up of different nationalities ... [since] united public opinion, necessary to the working of representative government, cannot exist”.<sup>4</sup>

To be sure, Mill's acknowledgement of homogeneity's political virtues was not a normative endorsement of its attainment where it did not already easily exist. Here Mill recognized the practical implications of his descriptive analysis: where different nationality groups were so intermingled as to make separation unthinkable “there is no course open to them but to make a virtue of necessity, and reconcile themselves to living together under equal rights and laws”.<sup>5</sup> The normative implication that only a homogenous culture could be compatible with liberal democracy was, in other words, too bleak analysis.

A similar analysis runs through Ernest Gellner's body of work on nationalism, but he captured a slightly different dimension of this descriptive-normative tension. Gellner's early theorizing posited that the needs of modernity favored a homogenizing, territorial congruence of nation and state—a congruence often achieved brutally by ethnic cleansing. Gellner bluntly wrote: “in those very extensive parts of the globe where there is a great proliferation of cultures, there are only two possibilities: either ... pluralism ... will be achieved, or there has to be ethnic cleansing”.<sup>6</sup> On the social historical record, however, the imperatives of modern, educated and industrial society favored—and indeed necessitated—a certain cultural homogeneity.

But in his later, more prescriptive theorizing, Gellner sought a liberal escape from the sobering consequences implied by this earlier analysis:<sup>7</sup> if cultures are given the widest possible space for social expression, he argued, under certain permissive conditions of modernity, and given certain political architectural designs, territorial homogeneity might become practically and symbolically less determinative, and

therefore pluralist accommodation of nationalism could be made easier and not require ethnic cleansing.<sup>8</sup> So as O’Leary noted, if the nation-state is “just one political form amongst many capable of managing or eliminating ethnonationalist conflict, and if the nation-state can be structured in culturally pluralist ways (consociational, federal or through other forms of co-sovereignty), then the world may not be governed by the logic of the strong version of Gellner’s theory.”<sup>9</sup> Like Mill, then, Gellner, too, understood the normative implications of his descriptive analysis of nationalism and hoped, therefore, that the imperative of modern development need not necessarily require homogeneity.

In short, despite a Millian recognition that homogeneity is conducive to democratic liberalism, and a Gellnerian recognition that homogeneity conducive to the functioning of modern, industrial society, the pluralist accommodation of diversity was still considered by both theorists to be normatively desirable on liberal grounds. Setting aside the issue of precisely how much cultural homogeneity or unity is implied, a key issue, then, is how to achieve a level of shared culture *after* coercive homogenization (read ethnic cleansing)—both to protect those minorities that remain and to avoid a post-hoc normative endorsement of the violence.

These theoretical lenses are useful for understanding key contradictions within Dayton. Indeed, our interview findings suggest that US elites worked with versions of these assumptions: that liberalism simultaneously required *both* some degree of either cultural or political homogeneity *and* also the accommodation of extant diversity. Their own domestic US experience told them that liberal legalist frameworks might liberalize ethnic nationalists and provide the basis for creating the shared political culture necessary for the functioning of diverse democracy. US policymakers considered what they were trying to accomplish at Dayton as resting squarely at the intersection of these two liberal imperatives. They recognized the demographic realities that ethnic cleansing had created: US negotiators assisted in militarily achieving homogeneity, they drew the IEBL between the Federation and the RS in meticulous detail to maximize regional homogeneity, and they sanctioned new, ethnically segregated municipalities—partially in a Millian recognition that political stability and liberal democratic institutions needed as much ethnic homogeneity as possible. But liberal instruments were also included in the Accords—extensive human rights provisions, judicial review, and refugee rights of return and restitution—as

attempts to find a liberal route back from the ethnic homogeneity that they had just sanctioned. This is how US elites themselves constructed their own efforts, and viewing their policies through this liberal Millian-Gellnerian lens allows us to better understand US policymakers' social knowledge of nationalism and the intentions that underlay the Dayton process and Accords.

### **Affirming homogeneity, or drawing 'viable borders'**

Less than four months before Dayton, State Department analysts concluded that ethnic cleansing had created a reality such that "restoring [Bosnia to] its pre-war demographic balance and ethnic distribution...appears virtually impossible."<sup>10</sup> As John Shattuck, then Assistant Secretary of State for Democracy, Human Rights and Labor, indicated it was analogous to scrambling eggs: once the eggs have been scrambled, there is no way to put them back, and indeed doing so "would have required a massive amount of social engineering, and once again it would have been [another] forced removal".<sup>11</sup> The general calculation was that Bosnia was no longer a conflict between ethnic groups, but a war between fully armed mini-statelets that could control and "cleanse" territory.<sup>12</sup>

Considered a compromise between a just settlement and geopolitical reality,<sup>13</sup> therefore, US negotiators sought and encouraged ethnically viable—that is, homogeneous or majoritized—regions, while at the same time foreclosing the possibility of formal partition. This was an unwritten policy aim based on a commonly accepted assumption, barely articulated at the time, but explained by James Pardew, then Director of Balkan Task Force at the Department of Defense:

...there's an underlying principle here, which we never discussed, but it reflects the American perspective, and that is that your citizenship is not defined by your ethnic affiliation, your citizenship is defined by your residence and birthplace. And that if you do it another way, then there is no way to draw a line that doesn't involve some kind of massive disruptive transfer of populations; *this whole idea of ethnic exclusivity does not match with our values, so the idea that the US would somehow promote an agreement which would be divisive along ethnic lines, ripping peoples' homes etcetera was just never considered seriously.*<sup>14</sup>

Despite this principled aversion, however, in diplomatic practice, the basic territorial borders that formed the predicate for Dayton's eventual settlement were the cumulative product of an arc of prior agreements that not only pragmatically accepted

ethnicity as the organizing principle of a two-entity state, but each successive attempt at drawing a stable cease-fire line reflected—and diplomatically sanctioned—both the demographic and the territorial gains made by the aggregate effects of ethnic cleansing. So the base maps for the negotiations were continually adjusted in recognition of these evolving demographic realities.<sup>15</sup> The refusal to partition while still trying to achieve as much homogeneity *within* the two ethnic entities, then, perfectly captured the Millian-Gellnerian defining descriptive-normative tension. Indeed this was what US policymakers meant by ‘viable borders’.

More specifically, the basic outlines of the Dayton map were developed in August 1995 by National Security Advisor Anthony Lake in a nine-page document which specified, among other things, that Dayton would be based on the Contact Group’s (the US, the UK, France, Germany and Russia) 51-49 percent territorial split, respectively between the Federation and the RS; that the US would press for “more viable borders” to reflect ethnic realities on the ground; and that Bosnia would be a unitary, non-partitioned state with a single constitution and two highly autonomous but ethnically-majoritarian entities.<sup>16</sup> In other words, the goals of the US negotiators and those of the Bosnian parties themselves were effectively the same: to give each group as much cohesive, ethnically homogenous, contiguous territory as possible. Continually updating the specific lines on the Contact Group allowed for a more “defensible distribution of territory”.<sup>17</sup> That is, internal borders that captured the most majoritized or de-pluralized ethnic distribution might facilitate greater political and liberal stability.

In practice this also involved “assisting” ethnic cleansing but for reasons of “liberal homogeneity”. In the months just before Dayton, the success of joint Croat-Muslim military counter offensives (made possible by the 1994 Washington Agreement) meant that Federation forces (disproportionately Croat) held only 33 percent of Bosnia’s territory, while Bosnian Serbs held nearly 70 percent.<sup>18</sup> So the realities of the ethnic geography were far from the desired 51-49 split. The key decision, then, was whether, and how far, to allow Federation offensives to militarily retake Bosnian Serb controlled territory.<sup>19</sup> US officials took a very specific—and contentious—decision to militarily manipulate the ethnic composition of Bosnia’s two constituent parts *before* Dayton in order to achieve the most homogenous internal ethnic border possible.

To this end, they encouraged Federation military action in some towns and regions; restrained it in others; and timed the call for a Dayton cease fire to coincide with the point where the Tudjman-led Federation forces were at their maximum reach, e.g. where the Croats would go no further on behalf of the Bosniaks.<sup>20</sup> Despite Lake's concerns about encouraging more bloodshed, Point Three of his peace script had been to get as close as possible to the 51-49 Contact Group map. So they called on Federation forces to release Goražde for Serb-held territory, and Holbrook encouraged them to take (that is, ethnically cleanse) Prijedor, Bosanski Novi, and Sanski Most—territories that they had been previously given on the Contact Group map: “the map negotiations are taking place on the battlefield ... and that is one of the reasons we have not delayed our territorial discussions. It would help matters greatly if these towns fell,” Holbrooke later wrote.<sup>21</sup> This meant that certain areas were permissibly “cleansed” a second time: first of Croats and Muslims by Bosnian Serb forces, and then of Serbs as Federation forces retook territory (e.g. Jajce in central Bosnia).

The glaring red light was Banja Luka: apart from the prospect of the potential displacement of 200-300,000 Serbs if it fell to Federation forces, Banja Luka was considered ethnically well within Serb territory, so it would anyway have to be given back to the RS in the negotiations. The decisions to allow Federation forces to retake territory—and then to stop them at 51-49 percent—were difficult and controversial, however: why stop the offensive? And why stay with 51-49 divisions?<sup>22</sup> As James O'Brien, State Department lead lawyer and drafter of the GFA, noted, even 15 years later

there is [still] no clear compelling answer, but ... it was [mostly] a humanitarian concern [on our part] because the next major city [the Federation forces] would have taken would have been Banja Luka [and we were] worried about a major Serbian refugee outflow, and thus an even greater humanitarian emergency—and more cause for Milosevic to send troops across the border.<sup>23</sup>

The assumption, then, was that a liberally viable internal border required a degree of ethnic homogeneity. Although as Shattuck noted, “it would also have been completely untenable if Serbia had come out the territorial winner of Dayton”.<sup>24</sup>

In the end, while there were 109 *opštine* or municipalities in 1991, in which Bosnian Muslims were more than 50 percent in 37, Serbs were more than 50 percent in 32, and Croats were more than 50 percent in 14 municipalities (see the IEBL in



Figure 1), and while Bosnian Muslims were a plurality in more municipalities than were Bosnian Serbs or Croats, the IEBL effectively cut through existing *opštine* to better reflect new demographic realities—that is, to create more homogeneous municipalities. So new *opštine* were created: Dayton increased the number of municipalities to 142 (79 in the Bosniak-Croat Federation, 62 in the RS and one for Brčko). In so doing, the amended and newly created *opštine* were either entirely homogenous or largely majoritized. So the IEBL effectively furthered electoral ethnic gerrymandering and further de-pluralized the new state on the Millian premise that this might make liberal arrangements more stable.

[FIGURE 1 HERE]

Original map compiled from data from Census of Bosnia and Herzegovina, 1991: J. Gelo, M. Grizelj, and A. Akrap, *Stanovništvo Bosne i Hercegovine: Narodni Sastav po Naseljima* (Zagreb: Državni zavod za statistiku, 1995)

Two additional, underlying knowledge claims or assumptions defined US policy: first, that Bosnia would not be partitioned, and second, that ethnicity and religion were not considered essentialized expressions of identity, but instrumentalized, elite-led political claims. US aversion to partition has been variously attributed to concerns about the wider strategic subtext of post-Soviet secessionism,<sup>25</sup> to a moral aversion to breaking up states,<sup>26</sup> or to an implicit commitment to liberal rights that viewed the maintenance of diversity as facilitative,<sup>27</sup> to fear of creating another Cyprus or Korea,<sup>28</sup> to a more general American foreign policy predilection for unitary states,<sup>29</sup> and to a generalized cautiousness about sanctioning secession—one also shared the UN and EU. As one key participant put it, international law is not a suicide club for states.<sup>30</sup>

Early in the process, then, a decision was taken that Bosnia would not be partitioned. As Pardew noted, “partition was not on the table; it was not viable ... because there is no place in the Balkans where you could draw a line and say Serbs here, Croats over there”.<sup>31</sup> Accordingly, US negotiators consistently rejected Karadžić’s efforts to legitimize a divided Bosnia, while consistently supporting Bosniak Prime Minister Haris Silajdžić’s vision of a multiethnic state.<sup>32</sup> When Tudjman sought a three-way territorial partition, warning of the “strategic realities” of drawing boundaries between the “Eastern” and “Western” worlds,<sup>33</sup> and offering to trade Banja Luka for Tuzla—in effect redrawing an internationally recognized border

so that Zagreb and Belgrade could control, respectively, western and eastern Bosnia—the US delegation forcefully argued the Bosniak position: this would have left “the Muslims in a landlocked mini-state around Sarajevo,” something the Americans termed “the Stalin-Hitler scenario” in reference to the division of Poland in 1939.<sup>34</sup> Ethnically homogenous partitioned republics would have created a Muslim state in the heart of Europe, so it was *better to pluralize the state, and ethnicize its constituent parts*.<sup>35</sup>

As Shattuck understood it, partition would simply have been “an extension of the scrambled egg problem—to create more states [would be like] continuing to scramble the egg”, or to create more irredentism; so “to maintain that there were going to inevitably be some ethnic enclaves within the [new Bosnian] state seemed far more preferable”.<sup>36</sup> “Partition has a lot of downsides once you start to pull that thread...you can’t draw any neat and tidy boundaries that wouldn’t leave any lingering issues”, Laurel Miller, assistant legal advisor to Roberts Owen, recalled. In fact, Roberts Owen, the lead legal advisor at Dayton and former State Department Legal Advisor, suggested that the governing US assumption that “a unit is better than a fragment” was perhaps longstanding across administrations, since the idea that allowing states to split into smaller fragments—especially as a result of violence or ethnic cleansing—was less a philosophical premise than it was a pragmatic or practical consideration on the part of US policymakers.<sup>37</sup>

Yet this was not simply an American position. Gro Nystuen, legal advisor to EU Special Envoy to the Former Yugoslavia Carl Bilt and author of Dayton’s “Human Rights Annexes”, shared this knowledge claim, though under a slightly different, human rights rationale:

You should be able to solve ethnic issues without reverting to secession; it doesn’t really solve problems. The state being synonymous with its people is an old idea [and] the UN Charter sets very firm boundaries for state sovereignty: it’s the building brick of international law [otherwise] you can’t have human rights treaties and you can’t have implementation of human rights ... Sovereignty is the prerequisite for being able to do anything [in terms of human rights] at all.<sup>38</sup>

With partition excluded, then, the IEBL only mattered if it contributed to liberal stability: census data and “demographics decided the map”, Pardew recollected. It was important that it be “stable internally, and we Americans didn’t

care at all where that [internal] line would be, if [the Bosnians] accepted it then the Americans accepted it”.<sup>39</sup>

The second knowledge claim was rooted in US understandings of the roles of ethnicity and religion in the Bosnian conflict. After initial wobbliness,<sup>40</sup> they came to reject the idea that the Balkan peoples were destined to fight each other, or that each ethnicity required its own state. The governing assumption was that multiethnicity was possible—and desirable—not only because moments in Yugoslav history stood as powerful testimony of its possibility, but also because of a particular view of nations and nationalism among administration elites: they believed that opportunistic politicians (inside and outside Bosnia) instrumentally manipulated religious and ethnic identities for their own political ends;<sup>41</sup> that being a Bosnian Serb was at once an expression of identity and a political aspiration to “run [their] own thing,” but the political aspiration could be decoupled from the identity claim.<sup>42</sup>

This instrumental view of nationalism meant that not only was the conflict not viewed as historically inevitable or ancient, but it was also seen as almost entirely politically manufactured—and this crucially made it amenable to diplomatic engagement and responsive to military force.<sup>43</sup> Ethnic nationalists might be liberalized, in other words, because ethnicity was not politics, and if under certain circumstances ethnicity could be violently politicized, then under different circumstances it could be de-politicized.

If liberalization of ethnic nationalists precluded partition while requiring as much internal ethnic homogeneity within a non-partitioned framework as possible, the efforts at drawing the viable borders were paradoxically characterized by US arguments against the political significance of these internal borders: they argued that liberalism could make them less determinative. As Pardew recollected, when Milošević demanded that the tiny village of Oblaj, near Bosansko Grahovo and otherwise deep in Federation territory, be given to the RS because it was the birthplace of the Bosnian Serb Gavrilo Princip (whose famous assassination of Archduke Ferdinand set off WWI), the American response was one of exasperated derision:<sup>44</sup> “if you wanted to throw a room into chaos, lay a map on the table,” Pardew told us, “we would come in with a blank map, and they would come in with their experts, books, and histories; Balkan history is in the eye of the beholder, so within short order it devolved into name-calling and finger-pointing and red faced yelling.”<sup>45</sup>

But US policymakers consistently countered what they viewed as historically essentialist claims with liberal arguments. Bob Frasure advised Tudjman against a “historically deterministic” approach: “Croatia must decide if it wishes to be viewed as a Western nation, with Western values and respectful of democratic processes, or Croatia can forego such Western political, military and economic support should it decide to take advantage of short-term gains and carve up Bosnia based on fears of an Islamic state in Europe”;<sup>46</sup> Owen used the examples of the Commonwealth of Massachusetts and the Republic of Texas as metaphors for the Republika Srpska, arguing that the territory’s name would be insignificant in light of the broader liberalized federal arrangement;<sup>47</sup> and Pardew, later the chief negotiator of the Orhid Agreement that created a multiethnic Macedonia, made the argument that “you can either be a twentieth-century European politician, or you can be a nineteenth-century Habsburg politician worried about territory”.<sup>48</sup>

And yet, based on the most contentious territorial claims at Dayton (Sarajevo, Brčko and the Posavina Corridor, Goražde, Srebrenica, Žepa, and Bosanski Novi), Dayton’s lines further ethnicized the municipalities, drawing each around an electorally dominant ethnic majority. The Department of Defense had brought the most advanced digital mapping technology, together with experts who had advised on the Iraqi-Kuwaiti border: General Wesley Clark, the US negotiating team’s military advisor, led a special unit of the Defense Mapping Agency to compute exact percentages of land using the highly classified imaging system, PowerScene, used in Desert Storm.<sup>49</sup> It offered a virtual flight simulation reality, visible in three dimensions down to two yards, and manipulated on a joystick. While most of the rooms in the Dayton compound had only a few human rights and constitutional lawyers, the map room was regularly overflowing: Tudjman, Milošević, and Izetbegovic could travel across Bosnian territories and terrain in such detail, and with such precision, that flying through the Posovina corridor, for instance, one could see a barn here, and on occasion someone would say, “I know this place—my family had a picnic there!”<sup>50</sup> Lines were initially manually drawn in grease pens on acetate maps scattered in the map room, but once these lines were transferred to the digital technology, the pen line represented four kilometers of territory—effectively changing the agreed upon 51-49 percent to 53-47. In the end, and after the final agreement was signed, Clark, Pardew, and the parties’ experts went village by village,

hill by hill, in painstaking detail to place the fine points on the map, drawing on both earlier census ethnographic maps and on the new realities of ethnic displacement. As a result, the IEBL runs with highly meticulous precision around the borders that ethnic cleansing created, drawn with the most modern technology to allow the most accurate essentialization of territory.<sup>51</sup>

Dayton's map, then, was drawn on the assumption that the eventual success of the constitutional settlement could only rest on some prior degree of ethnically viable homogeneity. Effective liberalism was thought to require an uncomfortable essentialization of territory. While Milošević and the Bosnian Serbs saw the political line as becoming permanent, like Cyprus or Korea. Both the Bosnian Muslims and the US/EU negotiators hoped that with time, economic activity, and political liberalism, the IEBL would become temporary and less significant.<sup>52</sup> Indeed policymakers viewed the eventual achievement of multiethnic democracy in Bosnia as normatively desirable: "there certainly was a norm that [US policy elites] were aspiring to. It was explicitly [understood] that multiethnicity was possible, and it also represented a rejection of the idea that there are certain populations that cannot live together and that therefore everyone needs their own home".<sup>53</sup>

So, resting squarely in the Millian-Gellnerian liberal tension, on the one hand US policy elites believed that territorial homogeneity—or electorally majoritized municipalities—would enable liberal legalist frameworks; on the other hand, they also hoped that imposed liberal frameworks and economic development might attenuate or mitigate the effects of homogeneity of their "viable borders".

### **Tempering homogeneity, or re-pluralizing Bosnia**

This Millian-Gellnerian tension among liberal imperatives was even more evident once the majoritized internal structure of Bosnia was decided and negotiated. The intensity of the map negotiations was contrasted by a remarkable indifference to many of the constitutional and nearly all of the human rights provisions American and EU lawyers drafted into the text to temper homogeneity—or to re-pluralize Bosnia.<sup>54</sup> The inclusion of fifteen human rights treaties, the constitution's design, electoral requirements, and refugee/IDP provisions were intended to mitigate the more vicious social implications of the ethnic map by offsetting the horizontal distribution of political power along ethnic lines with an individualist, human rights framework.

Designed both to liberalize ethnic nationalisms and to provide a framework for multiethnic social cohesion given that territorial minorities remained, it was hoped that the IEBL would become less potent, the liberal provisions inserted into the Accords in the immediate wake of ethnic cleansing would become more robust, and Bosnia could eventually return to its antebellum multiethnicity.<sup>55</sup> So broad attempts to find a politically liberal route back from ethnic cleansing's homogeneity were included as Annexes 3, 4, 6 and 7 (respectively, electoral requirements, the constitution, human rights provisions and refugee rights).

The new BiH constitution (Annex 4) embodied Dayton's core liberal contradiction. Three "constituent peoples" and ethnic majoritarianism were constitutionally delineated: "the link between the specific ethnicities and certain political rights constituted an inherent part of the political compromise".<sup>56</sup> Because ethnicity and citizenship were made equivalent, the "ethnic privileges in the constitutional system amount to discrimination based on ethnicity".<sup>57</sup> The use of constituent peoples to refer to the three ethnicities was a hold over from the Yugoslav Constitution, whose six "constituent nations" (*narod*) each had their own republics (Croats, Serbs, Slovenes, Macedonians, Montenegrins, and Muslims),<sup>58</sup> whereas Yugoslavia's non-territorial nationalities (*narodnosti*) included Albanians, Vlachs, Hungarians, and Yugoslavs (or "no ethnicity").<sup>59</sup> So these "Others," or eight percent of Bosnia's prewar population, were effectively erased from the constitutional settlement, excluded from the presidency, barred from holding office in the vetoing chamber of the Parliamentary Assembly, and from other forms of political participation.

This was recognized as a serious constitutional problem at the time of drafting, so to counter these ethnic exclusivities of the Constitution, the Accords' legal drafters, Gro Nystuen and James O'Brien, pushed through two broad but critical provisions: international human rights protections and judicial supremacy.<sup>60</sup> The first involved the inclusion of those rights contained in the European Convention on Human Rights (ECHR), with the new Human Rights Chamber given extensive jurisdiction over general issues of discrimination. These protections against ethnic discrimination were extensive: "since *ethnic* discrimination was one of the driving forces of the war ... it was felt that it was necessary to include a non-discrimination regime that was *stronger* than the regime laid down in the ECHR;" so the International Convention on

the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights were also included because of their very specific anti-ethnic discrimination provisions.<sup>61</sup>

But this meant that the ethnic balances adumbrated in the BiH constitution—and deemed necessary to reach a peace agreement—would violate other constitutional provisions for non-discrimination and for the observation of human rights standards.<sup>62</sup> Because the Presidency and the House of Peoples, as components of the Constitution, were in structural violation of the UN conventions included elsewhere in the Accords, as Nystuen, one of the drafters told us, the international human rights instruments included in the constitutional settlement were *purposely* in clear violation of the very ethnic components on which the constitution was predicated.<sup>63</sup>

“Realizing that the constitution would have this problem, there was a silver bullet that we sort of sneaked in there, which we thought was very clever”, Nystuen noted:<sup>64</sup> to partially compensate for this problem, European human rights provisions were given *priority over all other law*.<sup>65</sup> “We kept emphasizing the primacy of European human rights norms over everything throughout”, O’Brien recollected. So Article II section 2 specified that the ECHR would have priority over BiH law.<sup>66</sup> Milosevic (negotiating on behalf of the Bosnian Serbs) signed up to this—“I like Europe”—he said, and it anyway only affected Bosnia not Serbia.<sup>67</sup> But it was nevertheless a substantial relinquishment of sovereignty—something all the more stunning given that the architects of ethnic cleansing actually signed on to it. Bosnians were arguably accustomed to the language of certain human rights provisions as familiar elements of Yugoslav constitutions—although they were mostly constructed as social and collective provisions, not political ones around civil and individual liberties. But human rights generally were also understood and experienced in a political culture that in practice rarely instantiated them.<sup>68</sup> As a result, the extensive human rights provisions sailed through Dayton’s signatories with little disagreement.

The second provision pushed through by O’Brien, Nystuen, and the other Contact Group lawyers was that of judicial supremacy.<sup>69</sup> Early Bosnian Serb drafts had not provided for a judiciary—and certainly not one that allowed for non-Serb adjudication over Serb-held territory with the use of arbitration as a way of bridging differences.<sup>70</sup> So from the original O’Brien US draft through to the US-EU final draft there was provision for judicial supremacy with a single court system.

With these provisions, American and EU lawyers believed that they had inserted sufficient instruments, though inelegant from a legal standpoint,<sup>71</sup> as Nystuen recognized, to render the IEBL less politically salient over time, and perhaps gradually transform it into something like the American states or Canadian provincial boundaries.<sup>72</sup> And indeed some of these instruments were subsequently used that way. In 2009, for instance, through *Sejdić and Finci vs. Bosnia and Herzegovina* the European Court of Human Rights found that Bosnia was in violation of Article 14 on the prohibition of discrimination of the ECHR, and of Article 3 of Protocol No. 1 on the right to free elections to legislative bodies. The Court found that the Constitution rendered the two applicants—a Roma (Sejdić) and a Jew (Finci)—constitutionally ineligible to stand for election to Bosnia’s House of Peoples because they did not belong to Bosnia’s three “constituent peoples”, and that Bosnia violated Article 1 of Protocol No. 12 (on the prohibition of discrimination) because the applicants’ could not stand for election to the presidency.<sup>73</sup>

In other words, the Court used the human rights provisions embedded by Nystuen and O’Brien at Dayton to determine that other constitutional provisions were discriminatory and in violation of the human rights—just as Nystuen and O’Brien had hoped would happen. And yet, eschewing a possibility for legal self-correction, on at least three occasions the Bosnian Constitutional Court declined to revisit Dayton’s constitutional contradiction, despite having sufficient legal tools at hand<sup>74</sup>—to the disappointment of O’Brien and Nystuen themselves<sup>75</sup>—concluding instead that differential treatment based on ethnicity remains justified in Bosnia because of the deep and enduring ethnic divisions of post-conflict society.

The third and fourth set of provisions in the GFA that were designed to counter the map’s demographic reality of majoritized territories. Given that Dayton’s final map had essentially frozen the ceasefire with an estimated 2.5 million people—of a population of 4.4 million—internally displaced, an additional 1.1 million refugees, and at least 42 percent of total housing stock seriously damaged,<sup>76</sup> Dayton architects sought to detach both *voting* and *return/property restitution* from the demographic effects of ethnic cleansing, respectively through Annexes 3 and 7.<sup>77</sup>

The electoral Annex [3, Article 4 (1)], provided for refugees and displaced persons to vote in their pre-war domicile municipalities based on the 1991 Census, either in person if they could return, or by proxy ballot.<sup>78</sup> This annex was exceedingly



controversial since it sought to allow postwar electoral outcomes to reflect pre-war ethnic demographics rather than reward coerced ethnic displacement.<sup>79</sup> Milošević wanted voters to register in person in Bosnia, whereas the Bosnian Muslims wanted to allow absentee registration, and a vote based on the 1991 pre-war census. Indeed, had Annex 3 been fully implemented, it would have *electorally* (though not demographically) reversed the implications of ethnic displacement.

Importantly, however, displaced persons were blocked, threatened, or felt too frightened and insecure to return to original domicile municipalities (or prewar homes) to vote in the crucial 1996 elections; this resulted in exceptionally low turnout despite Dayton's provisions for absentee ballots.<sup>80</sup> In both 1996 and 1997 voter registration interferences were widespread and OSCE failed to properly administer the elections.<sup>81</sup> Under Dayton's Annex 3, it was also possible to apply to vote in the municipality of current displacement or where one would want to live in the future. Unsurprisingly, most displaced Bosniaks and Croats still living within the Federation sought to vote and register in prewar municipalities, but most Serbs displaced from the Federation and living in the RS sought to vote in their new, postwar municipality.<sup>82</sup> OSCE noted that the contradiction was because those displaced Serbs in RS were often coerced into registering to vote there (as so-called "future municipalities"), particularly those municipalities that were formerly Bosniak majority: local officials in the RS conditioned humanitarian and social assistance on their co-ethnics' registering in the RS, in other words, to shift electoral balances.<sup>83</sup> Regulations for displaced "others" allowed them to vote in current municipalities: for instance, in RS a residence document dated no later than 31 July 1996 had to be presented, thereby drastically reducing those "others" or non-coethnics who might be able to register in "future municipalities".<sup>84</sup> These tactics had the intention—and the effect—of creating ethnically gerrymandered municipal demographics, they strengthened nationalist party votes, and they ultimately placed secessionists in positions of authority. In the 1997 municipal elections, 80 percent voted along ethnic lines.<sup>85</sup>

Similarly intentioned, Article I (1) of Annex 7 gave all refugees and displaced persons the "right freely to return to their homes of origin"; "to have restored to them property of which they were deprived"; and to be "compensated for any such property that cannot be restored to them".<sup>86</sup> Dayton was the first peace treaty to make extensive

use of both right of return to pre-war domicile (not just country of origin) with provisions for property restitution—provisions now widely accepted as the basis of the UN’s “Pinheiro Principles” and adopted in contexts beyond Bosnia.<sup>87</sup> As with the electoral provisions, the extent to which ethnic segregation or majoritized homogeneity could be mitigated was also related to the extent to which refugee returns—and particularly minority returns—could be implemented.

Put differently, full implementation of Dayton’s return and housing provisions might have demographically recreated Bosnia’s pre-bellum multiethnicity. In its earliest implementation phases, compensation for property that could not be restored was linked to return; that is, if one wanted to be compensated for the destruction of their home, they had to return to their prewar domicile in order to make the claim. And there was perhaps a brief psychological moment when minority returns, or a slight unwinding of ethnic cleansing’s dislocating effects, could have been possible:<sup>88</sup> after five years of wartime deprivation, the end of hostilities initially witnessed a great desire to return home. But it never materialized for a number of related reasons: underlying trends of de-ruralization or urbanization, especially among the young; socioeconomic constraints; the prevalence of uncaptured war criminals and coercive local or municipal authorities, including most especially local police,<sup>89</sup> which could make returns risky;<sup>90</sup> age, class, and rurality;<sup>91</sup> difficulties in accessing social welfare services and pensions; and the slow and bureaucratic pace of property restitution claims and housing repairs, among other factors.<sup>92</sup>

There were also important practical differences between restitution of privately-owned properties and socially-owned housing: most of the privately owned properties were restituted in municipalities that had been demographically Serb-dominated before the war (and most of these tended to be in rural areas); while most socially-owned property restitution tended to be in municipalities that were demographically Bosnian Muslim dominated before the war—indeed these socially-owned urban apartments had been the most multiethnic spaces in pre-war Bosnia; for Croats it was more evenly split (see Figure 2). Therefore there were also underlying urban-rural and class dimensions to refugee and displaced person’s willingness to make property claims. Importantly, as Figure 2 shows, most of the areas where there were “no claims” were those areas bordering the IEHL in the Sarajevo suburbs where Serbs had fled, and in northeastern Bosnia on the RS side of the boundary line.

Moreover, if the majority of returns were initially those returning to places where they were in the majority ethnicity, with very few “minority returns”,<sup>93</sup> a class dimension to returns was also evident: middle class Serbs in Banja Luka, for instance, would prefer their former Croat or Bosniak middle class neighbors to their new ruralized and less affluent Serb neighbors; and Bosniaks in Mostar would prefer their previous Serb neighbors to the properties’ new rural inhabitants: peasants from Muslim villages in eastern Bosnia.<sup>94</sup>

So over time, with the general failure of the return process, Dayton’s *return-based system of property restitution* gradually evolved into a *rights-based system of property restitution*. Indeed, given the immediate post-war conditions, it is also possible that the return-based restitution provisions effectively amounted to forced repatriation or refoulement (e.g. a semi-forced return back into the same or similar conditions that caused flight in the first place), and therefore the eventual rights-based premise for property restitution that’s subsequently developed may in the end have been more consistent with voluntary repatriation.<sup>95</sup>

[FIGURE 2: HERE]

Original map compiled from data in “Housing Sector Task Force” (Sarajevo: International Management Group, 1999)

In particular, initial difficulties in implementing Annex 7’s return and restitution provisions changed in 2000 with the passage of the Property Implementation Plan (PLIP). PLIP enforced property laws more vigorously and facilitated the return process, and the so-called “Bonn Powers”<sup>96</sup> began to prioritize minority returns; the Office of the High Representative (OHR) began removing municipal and other local officials for obstructing returns (“anti-Dayton activities”); and PLIP “Focal Points” targeted specific municipalities with Regional Return Task Forces (RRTF), by running “property rights clinics”. With this, the return process gained momentum and repossession of property and property rights reinstatements were largely completed by 2006 (see Figure 3).<sup>97</sup> The patterns of return roughly correspond with those of displacement, with Bosniaks comprising the vast majority of returns, primarily to the Federation. Many of the returns of all ethnicities were to prewar municipalities, but to majoritized neighborhoods, not previous homes. A demographic analysis conducted just before the 1996 elections in BiH showed that

ethnic segregation of land were most thorough and complete in the RS and the least so in Bosniak territories.<sup>98</sup>

[FIGURE 3: HERE]

Original map; data drawn from Minority Returns from 01/01/1996 to 31/03/2005 in Bosnia and Herzegovina (Sarajevo: United Nations High Commissioner for Refugees, 2005).

In summary, then, these four provisions and their attendant subtle legal distinctions were in some ways cursorily conceived at the time and only tenuously thought through,<sup>99</sup> and with the exception of the Bosniaks' lawyer, Paul Williams, they were virtually ignored by the parties at Dayton. But their innovativeness and indeed their inclusion was made possible because, generally speaking, "human rights were fine, everyone loved human rights",<sup>100</sup> a participant told us. These far-reaching human rights provisions were, in the end, viewed simply as pieces of paper; unlike the map, which was final and real. But these provisions were also a non-coercive way of "rescrambling the egg", that is, they were liberal-legalist instruments that the Bosnians themselves could eventually use to re-pluralize the two ethnic entities.

These key human rights provisions, therefore, were also designed in the hope that over time and generations they could become robust, liberal bases for multiethnic realignments. As Pardew summarized much of the general thinking at the time:

the IBEL does reflect the ethnic cleansing, the overriding purpose was a peace agreement, [but] it was never seen by the Americans as something that was going to be the defining structure and set of principles forever; there was an assumption here that reasonable people would do the right thing—when the US started we had the articles of Confederation and ironed it out via civil war, so we Americans always thought that the vision here would be EU-NATO membership, and that economic imperatives, jobs etcetera would take hold and that a lot of this really awful, hostile, vicious political stuff would go by the boards as new generations come along.<sup>101</sup>

Several broad knowledge claims about nationalism and how to liberalize it underpinned these arrangements, however. First, in its totality Dayton set up a hybrid arrangement built on collective ethnic rights, with both integrative and ethnic federative elements. The ethnic exclusivities inserted into the BiH constitution were not American or EU preferences—in fact they resisted them—but they did reflect the power-sharing compromises deemed necessary to end the war. The extent to which US (and EU) policymakers were reluctant—and indeed despairing—at the inclusion

of collective ethnic or religious rights cannot be underestimated. The dilemmas, as they saw it, quintessentially captured the Millian-Gellnerian tension.<sup>102</sup> The imperative of including collective rights “was a huge challenge to our way of thinking, which is that if you don’t have individual rights, you don’t have anything; ... to have democracies you need to have individual rights”, Nystuen noted. As O’Brien summarized how they understood their dilemma:

For lawyers, from a [treaty] drafting standpoint, in my mind the struggle was never *whether* to have a rights-based solution, it was whether it’s individual rights or collective rights; and that’s where the difference was ... As an American lawyer, I had to accept that there were certain collective rights, and that felt unnatural to me because we don’t have them—it’s not part of the American legal framework, and so that was a huge thing.<sup>103</sup>

In fact, Miller similarly noted that, while she would have wanted more of an emphasis on individual rights ... we were dealing with a situation where what the parties themselves were used to and what they wanted were these collective rights, so there was a lot written into Dayton with us kind of holding our noses because it was very unappealing to have these collective rights ... which not only might have provided them some protection as groups, [but it] also forced them to have a group identity—what if you don’t want to have a group identity? What if your mom was one thing and your father was another? What if you married someone from another group? It excluded a lot of choice about identity in the name of protecting your group identity. But it was just something that we couldn’t get away from, it was just something recognized and recognizable to them.<sup>104</sup>

Moreover, several made the point that while multiethnic democracy is itself hard, it is nevertheless a deeper value or ideal to fight for—and that US history itself provides plenty of such examples (civil war, early federations, and immigration).<sup>105</sup> As Derek Chollet, who served at the State Department during this period, told us, “there is a sense [in the US] that people can overcome differences given the right framework and mechanism; multiethnicity is possible because we have achieved it in the US ... Multiethnicity ... was a choice made [in Dayton’s diplomacy] and it said that we don’t believe that narrative of this world [the Balkans] as being about ancient ethnic hatreds”.<sup>106</sup> Despite enshrining collective rights and territorial homogeneity, multiethnicity—or a re-pluralized, non-homogenous Bosnia—was the ultimate goal.

This highlights the fundamental knowledge claim, suggested by the American experience, that because ethnicity was seen as being mutable, a liberal settlement

could contain centrifugal nationalist claims and thereby allow for new identities and assumptions to emerge. Political behavior could be altered and ethnic nationalists eventually liberalized. “Policymakers rejected the idea that there was something immutable about being a Serb or a Muslim that said that you were destined to fight with one another”, Chollet again,

there was probably an aspirational part of it...there’s a certain arrogance in saying that they can’t [have multiethnic democracy] ... They were actually saying ‘yes’, you can do it, and there’s nothing immutable about these identities. Over time with the right leaders we’ve learned through our own [American] experience that certain leaders have stoked passions while others have brought us together; so that’s our experience and you just have to work your way through it.<sup>107</sup>

This was the liberal glue that would provide social cohesion. And yet this was in strained tension, as noted in the section above, with the abiding pragmatic calculation that homogeneity—majoritized electoral municipalities—continued to be a key condition for liberal stability.

## **Conclusion**

Dayton’s GFA pragmatically recognized ethnic demographic realities on the ground by affirming the ethnically majoritized regions ethnic cleansing had created; and yet it normatively imposed a series of liberal arrangements intended to mitigate the most socially brutal implications of the very ethnic cleansing to which it had just acquiesced—to find liberal routes back from homogeneity. A key theoretical tension, found in both Mill’s and Gellner’s analyses of nationalism, offers a useful lens through which to view US policymakers’ own thinking throughout the Dayton process. US policymakers sought homogeneity for purposes of stability and liberalism, recognizing—in Millian-Gellnerian vein—that the eventual success of liberal institutions’ ability to accommodate diversity would rest on the greatest degree of baseline homogeneity possible.

US policymakers had operated on a clear set of knowledge claims about nationalism: to achieve liberal stability, majoritarian regions are better than evenly ethnically mixed ones, but homogeneity is best; they worked on the belief that both partitioning and collective rights were unacceptable—and yet they acceded to both; ethnicity was understood in instrumental, non-essentialist, terms, with the corollary that nationalism was fundamentally a political claim and less an expression of

identity; and finally, a view that “liberal legalist” frameworks enabled multiethnicity, itself an important social and political aspiration. In other words, like Mill’s and Gellner’s analyses, the normative implications of this liberal tenet were too sobering to be left unaddressed. And the difficult realities of liberalizing ethnic nationalists continue to be acknowledged by many of Dayton’s key architects.<sup>108</sup>

While Dayton’s architects recognized that the new state would have a weak center, they nevertheless believed that it was capable of expanding its powers and that in a reasonable world it would have made for a real, multiethnic state.<sup>109</sup> As Shattuck noted, “the best instruments we had were indeed law and human rights ... [which] over time were likely to work, not forcing the redrawing of boundaries”. In other words, the limits to which ethnic cleansing could be pragmatically recognized had limits, and liberal imperatives at a minimum required an attempt to reverse it through a liberal legalism.

Put differently, many of their knowledge claims around nationalism revolved around the belief that this could be an experiment in liberal diversity, in some ways just as the US continued to be an experiment in diversity, with a particular normative value placed on pluralizing and liberalizing homogeneity. As Chollet characterized it, Dayton’s drafters and negotiators “tried to have higher ideals to reach for”: that identities could change and that liberalism should contain nationalism’s identity and political claims.<sup>110</sup> Indeed, Owen, who later negotiated the issue of Brčko, said that “what weighed most heavily on [his] mind was how to give the three ethnic groups equal rights but also how to get them to live together, and get used to living together over time. This led him to wondering what ‘ethnicity’ really was”: “[ethnicity] is really an artificial and sort of emotional division that has grown up, without any rationality at all”, he believed, “after all they did live side by side, intermarry without any divisions ... except going to church”; in this regard he viewed himself as “an American lawyer with civil rights on [my] mind”.<sup>111</sup> In this, US policymakers’ social knowledge of nationalism and its claims effectively treated (multiethnic) nation building as a policy problem involving the institutionalization of a liberal framework; the liberal route out of homogeneity was seen less as a identity problem, or as part of the substantive political task of grasping underlying power structures or modes of governance that characterized the former Yugoslavia.

## Notes

<sup>1</sup> Interviews with Derek Chollet, 1 Sept. 2010; Ivo Daalder, Director of European Affairs, National Security Council, 20 July 2010; Laurel Miller, 1 Sept. 2010; Roberts Owen, 5 Nov. 2010; and John Shattuck, 6 Aug. 2010. See James Gow, *Triumph of the Lack of Will* (London: Hurst, 1997), Chapter 10; Richard Holbrooke, *To End a War* (New York: Modern Library, Revised Edition, 1998); Steven L Burg and Paul S Shoup, *The War in Bosnia-Herzegovina* (London: M.E. Sharpe, 1999), Chapter 6, 7; Sabrina Ramet, *Balkan Babel* (Boulder: Westview Press, Third Edition, 1999), Chapter 12; Ivo Daalder, *Getting to Dayton* (Washington DC: Brookings, 2000); Derek Chollet, *The Road to the Dayton Accords* (London: Palgrave, 2005).

<sup>2</sup> The term “liberal legalism” is Judith Shklar’s, *Legalism* (Cambridge: Harvard University Press, 1986). See also Gary Bass, *Stay the Hand of Vengeance* (Princeton: Princeton University Press, 2002).

<sup>3</sup> Interview with James O’Brien, 28 April 2010.

<sup>4</sup> John Stuart Mill, *On Liberty and Other Essays* (Oxford: Oxford University Press, 1991), 430, 428.

<sup>5</sup> *Ibid.*, 430-1.

<sup>6</sup> Ernest Gellner, *Nationalism* (New York: NYU Press, 1997), 108.

<sup>7</sup> John A Hall, *Ernest Gellner* (London: Verso, 2010), Chapter 10.

<sup>8</sup> Ernest Gellner, *Language and Solitude* (Cambridge: Cambridge University Press, 1998), Chapter 28.

<sup>9</sup> Brendan O’Leary, “Ernest Gellner’s Theory of Nationalism,” in John A Hall, ed., *The State of the Nation* (Cambridge: Cambridge University Press, 1998), 78.

<sup>10</sup> United States Department of State [USDS], Freedom of Information Act [FOIA], Declassified/Released Document Collections: Bosnia, <http://foia.state.gov/SearchColls/> (Accessed 30 April 2011), Document 32: Report: “Bosnia: Serb ethnic cleansing,” 4 Aug. 1995.

<sup>11</sup> Shattuck interview.

<sup>12</sup> Interview with James Pardew, 3 Sept. 2010; Chollet and Miller interviews.

<sup>13</sup> Daalder interview. See also Daalder’s argument in *Getting to Dayton*.

<sup>14</sup> Pardew interview, emphasis added. Chollet, Daalder, and Owen offered us similar arguments.

<sup>15</sup> O’Brien interview. Pardew, Daalder and Chollet interviews.

<sup>16</sup> O’Brien interview. Chollet, *The Road to the Dayton Accords*, 43-44.

<sup>17</sup> FOIA 27: Telegram: State to USLO Skopje, 18 Aug. 1995; Pardew interview.

<sup>18</sup> FOIA 72: Telegram: Vienna Embassy to State, 16 Nov. 1994.

<sup>19</sup> Holbrooke, *To End A War*, 172; Chollet, *The Road to the Dayton Accords*, 43.

<sup>20</sup> O’Brien interview. See also Holbrooke, *To End A War*, 160-6, 191-3, 199.

<sup>21</sup> Holbrooke, *To End A War*, 172.

<sup>22</sup> Chollet interview; O’Brien interview.

<sup>23</sup> O’Brien interview.

<sup>24</sup> Shattuck interview.

<sup>25</sup> O’Brien interview; cf. Holbrooke, *To End A War*.

<sup>26</sup> Daalder interview.

<sup>27</sup> Interview with Gro Nystuen, 14 June 2010; Shattuck interview.

<sup>28</sup> Holbrooke, *To End A War*, 226.

<sup>29</sup> Personal correspondence, Brendan O’Leary.

<sup>30</sup> Nystuen interview.

<sup>31</sup> Pardew interview. Also confirmed in Chollet and O’Brien interviews.

<sup>32</sup> Pardew interview on Silajždić’s commitment to multiethnicity. On 26 Sept. 1995, Clinton formally announced, “America strongly opposes the partition of Bosnia”. Quoted in Holbrooke, *To End A War*, 183, see also 188.

<sup>33</sup> Quoted in Chollet, *The Road*, 49.



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- <sup>34</sup> Holbrooke, *To End A War*, 162, 177.
- <sup>35</sup> This was argued by the Bosniak leadership with the full agreement of the US administration, see FOIA 149: Telegram The Hague Embassy to State, 27 Aug. 1993.
- <sup>36</sup> Shattuck interview.
- <sup>37</sup> Owen interview.
- <sup>38</sup> Nystuen interview.
- <sup>39</sup> Pardew interview.
- <sup>40</sup> The Bush Sr. administration's belief was that these were longstanding ethnic hatreds in which the US did not have any strategic interest.
- <sup>41</sup> Chollet and Pardew interviews.
- <sup>42</sup> Chollet interview.
- <sup>43</sup> Ibid.
- <sup>44</sup> Pardew interview.
- <sup>45</sup> Ibid.
- <sup>46</sup> Quoted in Chollet, *The Road to the Dayton Accords*, 49.
- <sup>47</sup> Chollet interview.
- <sup>48</sup> Pardew interview.
- <sup>49</sup> Pardew interview for details.
- <sup>50</sup> Shattuck interview.
- <sup>51</sup> Pardew interview.
- <sup>52</sup> Nystuen, Owen, and Pardew interviews. See also discussion in Holbrooke, *To End A War*, 170.
- <sup>53</sup> Chollet interview.
- <sup>54</sup> Miller and Nystuen interviews.
- <sup>55</sup> Miller, Owen and Nystuen interviews.
- <sup>56</sup> Nystuen, Owen, Miller and O'Brien interviews. Gro Nystuen, *Achieving Peace or Protecting Human Rights?* (Leiden: Martinus Nijhoff, 2005), 4.
- <sup>57</sup> Nystuen, *Achieving Peace*, 181.
- <sup>58</sup> In practice, Bosnian Muslims were recognized as a constituent nation in 1963.
- <sup>59</sup> For an extended discussion see Christine Bell, *Peace Agreements and Human Rights* (Oxford: Oxford University Press, 2000), 144-149; Nystuen, *Achieving Peace*, Chapters 4, 5.
- <sup>60</sup> Nystuen and O'Brien interviews.
- <sup>61</sup> Nystuen, *Achieving Peace*, 105-126, quote p. 105, emphasis in original.
- <sup>62</sup> Ibid., 14-16.
- <sup>63</sup> Nystuen interview.
- <sup>64</sup> Ibid.
- <sup>65</sup> Nystuen, *Achieving Peace*, 98-103, our emphasis.
- <sup>66</sup> Ibid., 97.
- <sup>67</sup> O'Brien interview.
- <sup>68</sup> Milošević did not even look at the specific human rights provisions. Nystuen interview.
- <sup>69</sup> O'Brien interview.
- <sup>70</sup> Ibid.
- <sup>71</sup> Nystuen interview.
- <sup>72</sup> Holbrooke said as much in an interview within hours of signing the agreement: *MacNeil-Lehrer Newshour*, PBS, 21 Nov. 1995: <http://www.youtube.com/watch?v=JGELVI28Dqk> (accessed 17 April 2012). Pardew interview.
- <sup>73</sup> See European Court of Human Rights Case Nos. 27996/06 and 34836/06: <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=860268&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (Accessed 26 Nov. 2011).
- <sup>74</sup> Marko Milanovic, "Sejdić & Finci V. Bosnia and Herzegovina," *American Journal of International Law* 104(4) (2010), 639.
- <sup>75</sup> Nystuen interview.

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- <sup>76</sup> Figures from “Housing Sector Task Force” (Sarajevo: IMG, 1999).
- <sup>77</sup> John Malik, “The Dayton Agreement and Elections in Bosnia,” *Stanford Journal of International Law* 36 (2000), 305.
- <sup>78</sup> See GFA Annex 3: Agreement on Elections, Article 4(1) [http://www.ohr.int/dpa/default.asp?content\\_id=371](http://www.ohr.int/dpa/default.asp?content_id=371) (Accessed 28 Feb. 2012).
- <sup>79</sup> Nystuen interview. See also, Malik, “The Dayton Agreement,” 316-318; Nystuen, *Achieving Peace*, Chapter 1.
- <sup>80</sup> Malik, “The Dayton Agreement,” 327-329; “Elections in Bosnia and Herzegovina”, International Crisis Group (ICG) Bosnia Report 16 (22 Sept. 1996).
- <sup>81</sup> Malik, “The Dayton Agreement,” 335-341.
- <sup>82</sup> “Elections in Bosnia and Herzegovina”.
- <sup>83</sup> *Ibid.*, 98.
- <sup>84</sup> “Bosnia and Herzegovina Municipal Elections 13-14 Sept. 1997”, OSCE/ODIHR Report (1997).
- <sup>85</sup> Malik, “The Dayton Agreement,” 344.
- <sup>86</sup> See GFA Annex 7: Agreement on Refugees and Displaced Persons [http://www.ohr.int/dpa/default.asp?content\\_id=375](http://www.ohr.int/dpa/default.asp?content_id=375) (Accessed 28 Feb. 2012).
- <sup>87</sup> See Scott Leckie, ed., *Housing, Land, and Property Restitution Rights* (Cambridge: Cambridge University Press, 2007), 23-32, 135-160.
- <sup>88</sup> Interview with Amela Tandara, OSCE Property Rights Adviser, 2 Feb. 2011.
- <sup>89</sup> “Going Nowhere Fast”, ICG Bosnia Report No. 23 (1 May 1997).
- <sup>90</sup> Roberto Belloni, “Peacebuilding at the Local Level,” *International Peacekeeping* 12(3): 434-447 (2005); “War Criminals in Bosnia’s Republika Srpska”, ICG Balkans Report 103 (2 Nov. 2000).
- <sup>91</sup> Gerard Toal and Carl T Dahlman, *Bosnia Remade* (Oxford: Oxford University Press, 2011), Ch. 10.
- <sup>92</sup> “Minority Return or Mass Relocation?”, IGC Bosnia Report 33 (14 May 1998).
- <sup>93</sup> “Interim Evaluation of RRTF Minority Return Programmes in 1999” (Berlin: ESI, 1999).
- <sup>94</sup> James A. Schear, “Bosnia’s Post-Dayton Traumas” *Foreign Policy* 104: 86-101 (1996).
- <sup>95</sup> See Timothy Waters, “The Naked Land” *Harvard International Law Journal* 40(2): 1-81 (1999).
- <sup>96</sup> In 1997 the Bosnia Peace Implementation Council (PIC) granted the OHR the authority to remove officials obstructing the implementation process.
- <sup>97</sup> UNHCR Representation in Bosnia and Herzegovina, Statistics Package, 31 Dec. 2010. Interviews with Tandara and Armin Hošo, UNHCR Assistant Field Officer, 2 Feb. 2011.
- <sup>98</sup> Malik, “The Dayton Agreement,” 343.
- <sup>99</sup> Anonymous official, background interview, 8 March 2011.
- <sup>100</sup> Nystuen interview.
- <sup>101</sup> Pardew interview.
- <sup>102</sup> O’Brien, Owen, and Pardew interviews.
- <sup>103</sup> O’Brien interview.
- <sup>104</sup> Miller interview.
- <sup>105</sup> Daalder interview. Chollet, Nystuen, and Pardew interviews.
- <sup>106</sup> Chollet interview.
- <sup>107</sup> *Ibid.*
- <sup>108</sup> Miller, Nystuen, O’Brien, Owen, Pardew, and Shattuck interviews.
- <sup>109</sup> Anonymous official.
- <sup>110</sup> Chollet interview.
- <sup>111</sup> Owen interview.